In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1559

CIPRIANO D. ALONZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of narcotics violations under 21 U.S.C. 174. He thereafter moved for acquittal or a new trial, urging, *inter alia,* that the method of entry by state officers into his home at the time of his arrest violated the Fourth Amendment. The district court denied the motion (Pet. App. B) and the court of appeals affirmed (Pet. App. A).

The facts are set forth in the opinion of the court of appeals. They show that on October 4, 1968, federal undercover narcotics agent Heard, having previously made two purchases of heroin from one Jackson, telephoned Jackson regarding a further purchase of six

423-776—71

"pieces" of heroin. Jackson told Heard that his "man" was available and would be there by the time Heard arrived. When Heard arrived at Jackson's apartment, the latter told him that his "man" was a short distance away and would bring the drugs. Jackson thereafter answered the telephone and spoke to someone he called "Pete"; he asked "Pete" to bring the six "pieces". Petitioner arrived shortly thereafter and was introduced to Heard as "Pete". Petitioner told Heard he had not brought the heroin to the apartment because he "didn't like the way it looked outside". At petitioner's suggestion, it was decided to complete the transaction at petitioner's residence.

After driving to petitioner's house,[1] the three men went to the kitchen where petitioner requested Jackson to furnish him with the "package". Jackson removed a brown paper bag from his coat pocket and handed it to petitioner. Petitioner took two rubber balloons containing heroin from the bag and emptied the drug onto a piece of newspaper. He then mixed the heroin with milk sugar, commenting that it had not been "cut" before.

At this point Heard left the room and telephoned the California Bureau of Narcotics. He told the operator who answered to radio State agents, who had been watching petitioner's home, that the evidence was inside and that they should make the arrests.

The arrests were made by State narcotics officers and San Francisco police some three minutes later. Agent Elsberg knocked at the door while police officer

[1] Petitioner and Jackson went in one car; Heard followed in his own vehicle.

Morrow yelled: "Police Officers, we are here on a narcotic raid." The door remained closed. Morrow testified he heard running and the barking of petitioner's dogs. After about fifteen or twenty seconds, Morrow ordered Elsberg to kick in the door; this was done. Morrow testified that his decision to enter the residence forcibly was based on a concern for Heard's safety since the latter did not have any money to pay for the drugs. Morrow further stated that he had received information that petitioner was "generally armed".

The court of appeals held that under Section 844 of the California Penal Code,[2] as interpreted by the California Supreme Court in *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, certiorari denied, 352 U.S. 858, the method of entry of the State officers was proper since exigent circumstances existed justifying the forcible entry within 15 to 20 seconds after the announcement of purpose and authority.

Petitioner contends that the validity of the entry should have been determined under the allegedly more rigorous federal standards laid down by 18 U.S.C. 3109 (set forth at Pet. 2), since the entry was for the purpose of making an arrest for a federal crime. However, the choice of law is without significance in this case, since the facts show that under either the federal or state statute the forcible entry in this case was justified. The officers did announce their purpose and

[2] Section 844 provides in pertinent part that a peace officer "may break open the door or window of a house in which the person to be arrested is * * * after having demanded admittance and explained the purpose for which admittance is desired."

authority; the only issue is whether they waited long enough before breaking down the door. It is clear that they did give the reasonable basis for apprehension that the officer inside the home was in danger. See *Ker* v. *California,* 374 U.S. 23, 39–40; *id.* at 55 (opinion of Brennan, J.); *Sabbath* v. *United States,* 391 U.S. 585, 591 n. 8.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971